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Of Counsel

H. LaDon Baltimore

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2005 MAR 22 11:08 AM

T.R.A. DOCKET ROOM

March 22, 2005

Honorable Pat Miller, Chairman  
Tennessee Regulatory Authority  
ATTN: Sharla Dillon, Dockets  
460 James Robertson Parkway  
Nashville, TN 37243-5015

**Via Hand Delivery**

Re Enforcement of Interconnection Agreement Between BellSouth  
Telecommunications, Inc. and NuVox Communications, Inc.; Docket No. 04-  
00133

Dear Sharla:

Per your conversation with Dian in my office of this date, enclosed for filing please find the original and 13 copies of the signed and notarized affidavit of Hamilton E. Russell III (Exhibit 4 to NuVox's Reply Brief) which is to replace the unsigned copy of the affidavit attached to our filing of yesterday. Please return a date stamped copy to the courier making this delivery. Thank you for your assistance.

If you have questions, please do not hesitate to contact me.

Sincerely,

*H. LaDon Baltimore / dcg*

H. LaDon Baltimore  
NuVox Communications, Inc.

LDB/dcg  
Enclosures  
cc Parties of Record

**BEFORE THE  
TENNESSEE REGULATORY AUTHORITY**

**RECEIVED**

2005 MAR 22 AM 11:08

In re: )  
)  
Enforcement of Interconnection Agreement )  
Between BellSouth Telecommunications, Inc. )  
And NuVox Communications, Inc. )  
\_\_\_\_\_ )

T.R.A. DOCKET ROOM

Docket No.: 04-00133

**AFFIDAVIT OF HAMILTON E. RUSSELL, III  
ON BEHALF OF NUVOX COMMUNICATIONS, INC.**

I, Hamilton E. Russell, III, of legal age, being duly sworn, do hereby depose and state:

1. My name is Hamilton E. Russell, III. I have personal knowledge of the facts stated herein, and they are true and correct.
2. My business address is 2 North Main Street, Greenville, South Carolina. I am currently employed by NuVox Communications, Inc ("NuVox") as a Vice President of Legal Affairs. In this position, I am responsible for legal and regulatory issues related to or arising from NuVox's purchase of interconnection, network elements, collocation, and other services from BellSouth. Prior to holding this position, I was a Regional Vice President of Regulatory and Legal Affairs for NuVox. In that capacity, I was responsible for negotiating numerous interconnection agreements on behalf of NuVox and its predecessor, TriVergent, including the interconnection agreement ("Agreement") that underlies this dispute.
3. NuVox is a competitive local exchange carrier ("CLEC") that provides telecommunications services in various states throughout the United States, including Tennessee and other states in BellSouth's region.
4. I was personally involved in negotiating the regional nine-state interconnection Agreement that is at issue in this case. As such, I participated in the negotiation of section 10.5.4

of Attachment 2 to the parties' Agreement. Mr. Hendrix, BellSouth's affiant, did not participate in the negotiation of that section.

5. The parties entered into and signed a single interconnection agreement that would govern their relationship throughout each of the nine states in BellSouth's region. The parties filed copies of the interconnection agreement with the applicable state commission. Although there is technically a different interconnection agreement in each state approved by each state commission, the provisions in each agreement relevant to this dispute are identical and their meaning does not vary from state to state.

6. The parties voluntarily negotiated the terms and conditions of the Agreement pursuant to section 252(a)(1) of the Communications Act of 1934, as amended (the "Act"). The parties did not arbitrate any of the provisions before any state public service commission.

7. The parties were fully aware of the Federal Communications Commission's ("FCC") *Supplemental Order Clarification* when they negotiated the Agreement.

8. BellSouth's right to audit NuVox's converted EELs circuits is not based solely on section 10.5.4 of the Agreement. Instead, BellSouth's right to audit NuVox's circuits is governed by the Agreement as a whole, including sections 35.1 and 23 of the General Terms and Conditions, which incorporates the concern and independent auditor requirements of the *Supplemental Order Clarification*.

9. Accordingly, there are several provisions of the Agreement—in addition to section 10.5.4—that are relevant to whether the parties incorporated the *Supplemental Order Clarification* into their Agreement.

10. The parties agreed that the Agreement would be governed by the laws of Georgia. Section 23 of the General Terms and Conditions of the Agreement specifies that the Agreement is governed by Georgia law.

11. The parties also negotiated an applicable law provision, which, consistent with their choice of Georgia law, reflects the parties' agreement to comply with all applicable law in effect at the time of contracting (subsequent changes in law may be included via change in law amendments). All applicable law is incorporated into the Agreement unless specifically excluded or displaced. Section 35.1 of the General Terms and Conditions states.

Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law, and nothing herein shall be deemed to prevent either Party from recovering its cost or otherwise billing the other Party for compliance with the Order to the extent required or permitted by the term of such Order.

Agreement, General Terms and Conditions, § 35.1.

12. The parties, therefore, clearly incorporated the concern and independent auditor requirements of the *Supplemental Order Clarification* into the Agreement.

13. Since we chose Georgia law as governing and further memorialized a basic tenet of Georgia law in the applicable law provision, there was no need to ensure that each audit prerequisite contained in the *Supplemental Order Clarification* was repeated verbatim in section 10.5.4 of Attachment 2.

14. In addition, the parties did not exclude or displace the concern and the independent auditor requirements of the *Supplemental Order Clarification* from the Agreement. Indeed, the parties specifically negotiated the EELs audit provisions, and intended to include

these requirements from the *Supplemental Order Clarification*. BellSouth initially proposed language in the Agreement that would have allowed BellSouth to conduct audits at its “sole discretion.” I recall that the parties discussed and agreed that the proposed language was inconsistent with the prerequisites set forth in the *Supplemental Order Clarification*, including the concern requirements set forth in footnote 86 of that order. Accordingly, the parties agreed to strike the language from the Agreement.

15 Section 10.5.4 of the Agreement does not operate independently from the General Terms and Conditions of the Agreement.

16 BellSouth’s own actions indicate that it believes that the *Supplemental Order Clarification* is part of the parties’ Agreement. For example, by letter dated March 15, 2002, BellSouth notified NuVox of its intent to conduct an audit. As Mr Hendrix states in his affidavit, BellSouth also submitted that letter to the FCC, in accordance with the requirement in the *Supplemental Order Clarification* that the ILECs notify the FCC prior to conducting an audit. That particular requirement, however, is not stated in the parties’ Agreement, but is incorporated into the Agreement by operation of the fact that the *Supplemental Order Clarification* is incorporated into the Agreement. There are other examples and I expressly reserve the right to testify about them, if necessary, in accordance with a procedural schedule adopted by the Authority

17. BellSouth has not demonstrated a concern with regard to auditing the circuits at issue. BellSouth sent a letter to NuVox dated March 15, 2002, in which it indicated that it intended to conduct an audit of NuVox’s converted EELs circuits. At that time that BellSouth made its audit request, NuVox had converted approximately 260 special access circuits to EELs in Tennessee.

18. After receipt of the letter, NuVox requested that BellSouth demonstrate a concern, as required by the *Supplemental Order Clarification*. BellSouth acknowledged its obligation to do so, but has since reversed position. NuVox also raised numerous other issues regarding BellSouth's request. To this end, NuVox and BellSouth conducted several phone calls and exchanged extensive correspondence. The parties were unable to resolve many of these issues.

19. In a letter dated April 1, 2002, BellSouth offered the following reasons for the audit request: (1) BellSouth's records show a high percentage of intrastate access traffic in Tennessee and Florida, and (2) NuVox now claims a significant change in certain percent interstate jurisdictional factors. The information that BellSouth provided in its letter dated April 1, 2002, is to my knowledge false and does not appear to be related in any way to the converted EEL circuits for which NuVox has certified that it was the sole provider of local services at the time of the conversion request. Moreover, NuVox and BellSouth have agreed that the percentage of local traffic factors for those states is in the mid-ninety percent range. BellSouth has refused informal and formal requests to provide documentation to support its accusations. Thus, the unsupported and false allegations made by BellSouth in this regard are insufficient to demonstrate a concern.

20. More than a year after requesting an audit, BellSouth made additional unsupported allegations of a concern regarding various converted EEL circuits in Tennessee. BellSouth has refused informal and formal requests to provide documentation to support its accusations. Given that BellSouth has made erroneous, and in my view, highly suspect, allegations of concerns to justify its audit request, I will not consider accepting BellSouth's latest manufactured allegations of concern (see BellSouth Complaint, ¶¶ 19-22) without reviewing supporting documentation first.

21 NuVox has contested the scant factual allegations that BellSouth has made allegedly to support its audit request (such as arguing that BellSouth identified a certain number of customers that also received local exchange service from BellSouth). BellSouth has refused to provide any documentation to support its claim, despite the fact that NuVox is contesting BellSouth's allegations

22. The consulting firm BellSouth proposes to use to conduct the audit in Tennessee, American Consultants Alliance ("ACA"), is the same consulting firm that BellSouth proposed to use to conduct the audit in Georgia

23 It is my understanding, based on the testimony of Ms. Padgett, that ACA is not itself capable of complying with AICPA standards.

24. The consulting firm that BellSouth wants to use to conduct the audit is not independent. It is my understanding that the parties agree that, in order to be independent, ACA cannot be subject to the influence or control of BellSouth.

25 Information provided by BellSouth to NuVox indicates that ACA is a consulting firm that is dependent on incumbent LECs and their affiliates for the bulk of their work. The roster of ACA engagements provided to NuVox does not indicate that ACA has done work for any competitive LECs that are not themselves affiliated with incumbents. In its marketing materials, ACA touts as "highly successful" its audits that have received millions of dollars for its incumbent LEC clients

26. In addition, it is my understanding that ACA has had various conversations with BellSouth regarding the *Supplemental Order Clarification* and has even had private mid-audit conversations with BellSouth seeking BellSouth's help in getting information from the CLEC

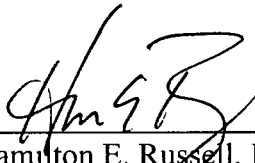
being audited. A professional and independent auditor would not have such conversations that cast such serious doubt on its impartiality and independence.

27. NuVox repeatedly has indicated that it would accept a nationally or locally well recognized independent auditor to conduct the audit and BellSouth has steadfastly refused to suggest any firm other than ACA.

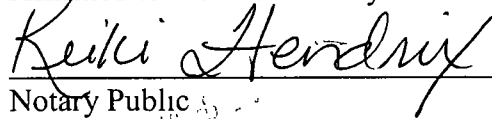


28. These factors preclude ACA from qualifying as an independent auditor in this matter.

This concludes my affidavit.

  
Hamilton E. Russell, III

Affirmed to me this 21st day of March, 2005.

  
Notary Public



Seen and subscribed before me on  
21st day of March, 2005

  
Notary Public's Signature  
Commission Expires May 12, 2014